Supreme Court, U. S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1644

LLOYD F. AND ELOISE L. CANFIELD,
Petitioners,

v.

THE CITY OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

RICHARD S. GEBELEIN
State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3838
Attorney General of the State of Delaware

Of Counsel:
EUGENE R. FIDELL
AUSTIN P. OLNEY
ALAN KONEFSKY
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

May 16, 1980

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS, JUDGMENTS, AND ORDERS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	3
INTEREST OF THE STATE OF DELAWARE	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	
I. THE SECOND CIRCUIT'S CONCLUSION THAT AN INTERSTATE EQUITABLE APPORTIONMENT EXTINGUISHES A PRIVATE RIPARIAN OWNER'S RIGHT TO DAMAGES FROM AN UPSTREAM DIVERTER CONFLICTS WITH PRIOR DECISIONS OF THIS COURT	5
II. THE SECOND CIRCUIT DECISION, IF ALLOWED TO STAND, MUST LEAD EITHER TO A DEPRIVATION OF PRIVATE RIPARIAN OWNERS' CONSTITUTIONAL RIGHT TO COMPENSATION OR TO A RESULT CONTRARY TO FEDERAL WATER RESOURCE MANAGEMENT POLICY	6
III. THE SECOND CIRCUIT DECISION DIRECTLY AFFECTS THIS COURT'S EXERCISE OF ORIGINAL AND EXCLUSIVE JURISDICTION OVER CONTROVERSIES BETWEEN STATES	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Greenwich Water Co., 138 Conn. 205, 83 A.2d 177 (1951) 6

Badgley v. City of New York, 606 F.2d 358 (2d Cir. 1979) ..... *passim*

Dugan v. Rank, 372 U.S. 609 (1963) 7

Elwood v. City of New York, 450 F. Supp. 846 (S.D.N.Y. 1978) 2

Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936) 6

Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334 (1933) 6

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 5

In re Van Etten v. City of New York, 226 N.Y. 483, 124 N.E. 201 (1919) 6

Land v. Dollar, 330 U.S. 731 (1947) 7

New Jersey v. New York, 283 U.S. 336 (1931) 5

New Jersey v. New York, 347 U.S. 995 (1954) 4

New York City v. Pine, 185 U.S. 93 (1902) 6

Smith v. City of Rochester, 92 N.Y. 463 (1883) ... 6

CONSTITUTION:

U.S. CONST. art. III, §2 10

U.S. CONST. amend. V 6

U.S. CONST. amend. XIV, §1 6

Page

STATUTES:

28 U.S.C. § 1251 (Supp. II 1979) 10

28 U.S.C. §1254(1) (1976) 2

DEL. CODE ANN. tit. 7, §6501 *et seq.* (1975) 4

Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) 4

Water Resources Planning Act, §2, 42 U.S.C. §1962 (1976) 8

MISCELLANEOUS:

DELAWARE RIVER BASIN COMMISSION, ANNUAL REPORT (1978) 4

DELAWARE RIVER BASIN COMMISION, FINAL REPORT AND ENVIRONMENTAL IMPACT STATEMENT OF THE LEVEL B STUDY (1979) 9

DELAWARE RIVER BASIN COMMISSION, RES. 78-20 (1978) 4

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1644

LLOYD F. AND ELOISE L. CANFIELD,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42(1) and (4) of the Rules of this Court, the State of Delaware by its Attorney General respectfully submits its brief as *amicus curiae* in support of the petition by Lloyd F. and Eloise L. Canfield for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on September 27, 1979 in that court's Docket No. 78-7199.

OPINIONS, JUDGMENTS, AND ORDERS BELOW

The opinion of the United States District Court for the Southern District of New York, *Elwood v. City of New York*, which awarded judgment in favor of petitioners and others similarly situated, is reported at 450 F. Supp. 846 and appears in Appendix A to the petition for writ of certiorari. The judgment of the District Court appears in Appendix B to the petition for writ of certiorari. The opinion of the Court of Appeals, *Badgley v. City of New York* ("*Badgley*"), which reversed the judgment of the District Court, is reported at 606 F.2d 358 and appears in Appendix C to the petition for writ of certiorari. The judgment of the Court of Appeals appears in Appendix D to the petition for writ of certiorari. The orders of the Court of Appeals, which denied rehearing and rehearing *en banc*, appear in Appendix E to the petition for writ of certiorari.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

QUESTIONS PRESENTED

1. Whether a private riparian owner's right to compensatory damages from an upstream diverter survives an interstate equitable apportionment of waters by a Supreme Court decree or by interstate compact.

2. Whether the Second Circuit rule effects a deprivation of private riparian owners' constitutional right to just compensation.

3. Whether the Second Circuit rule contradicts the federal policy to encourage interstate cooperation for river management.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory, and regulatory provisions involved are referred to in the petition for writ of certiorari at pages 3-4, and are found in Appendix F thereto.

INTEREST OF THE STATE OF DELAWARE

The Second Circuit holding adversely affects the rights of Delaware riparian owners, who are situated downstream in the Delaware River Basin. *Badgley* extinguishes the downstream riparians' right to compensation from upstream out-of-state diverters acting under an interstate equitable apportionment. The holding below suggests that Delaware riparians can seek compensatory damages only from the State of Delaware. Delaware seeks to affirm its riparian citizens' historic right to compensatory damages against the upstream diverter. The state also seeks to have this Court overrule the Second Circuit's novel suggestion that downstream riparians must sue their own state in order to be compensated.

The Second Circuit holding encumbers the management of interstate waters by attaching a penalty to a state's participation in any interstate equitable apportionment: the state forfeits its private riparian owners' right to compensation against the upstream diverter. The Second Circuit holding also suggests that a state's participation in an interstate equitable apportionment exposes that state to liability for the diminution of its downstream private riparians' rights. Delaware seeks to protect its ability to participate freely in the interstate management of the Delaware River Basin.

Delaware is a party to this Court's 1954 decree[1] and a signatory of the Delaware River Basin Compact.[2] It participates in the continuing activities of the Delaware River Basin Commission on interstate water management issues. It has joined the other Basin states and New York City in a reappraisal of the Decree.[3] The negotiations are still in progress, but Delaware's negotiating position has been prejudiced by the decision below. Delaware has a direct and immediate interest in the resolution by this Court of the serious problems raised by the *Badgley* decision.

STATEMENT OF THE CASE

Salient features of the decisions below are described in the Statement of the Case provided in the petition for writ of certiorari at pages 4-8.

---

[1] *New Jersey v. New York*, 347 U.S. 995 (1954) ("Decree").

[2] Pub. L. No. 87-328, 75 Stat. 688 (1961) ("Compact"). Delaware's ratification of the Compact is found at DEL. CODE ANN. tit. 7, §6501 *et seq.* (1975).

[3] On December 13, 1978, the Delaware River Basin Commission ("DRBC") adopted unanimously a resolution inviting the parties to the Decree to "enter into serious good faith discussions to establish the arrangements, procedures, and criteria for management of the waters of the Delaware Basin consistent with the Compact." DRBC, RES. 78-20 (1978). The ensuing exchange of letters between the parties to the Decree is described in the DRBC, ANNUAL REPORT 5 (1978).

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S CONCLUSION THAT AN INTERSTATE EQUITABLE APPORTIONMENT EXTINGUISHES A PRIVATE RIPARIAN OWNER'S RIGHT TO DAMAGES FROM AN UPSTREAM DIVERTER CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Equitable apportionment of interstate waters may be effectuated either by Supreme Court decree or by interstate compact. *Compare New Jersey v. New York*, 283 U.S. 336 (1931) (decree) *with Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (compact). *See especially id.* at 104. The precedents of this Court establish the principle that equitable apportionment of interstate waters extinguishes the private riparian owner's remedy to seek injunctive relief in order to obtain water in excess of his state's share. *See, e.g., Hinderlider*, 304 U.S. at 102. Without citation of authority, the Second Circuit in *Badgley* extended the principle of *Hinderlider* to deny riparian owners the remedy of compensatory damages. In so doing, the Second Circuit ignored the underlying rationale behind the principle that private riparian owners cannot compel specific relief in the form of a water flow in excess of the amount permitted under an equitable apportionment of interstate waters. This rationale is that enforcement of a private riparian right to enjoy an excess level of flow would disrupt the interstate equitable allocation established by agreement among states. The elevation of a private right to specific performance above an interstate agreement cannot be tolerated. The facts in *Hinderlider*, the principal authority relied upon by the Second Circuit, dramatically illustrate the physical impossibility of satisfying a private right to specific performance without disrupting an interstate apportionment.

However, the danger of disrupting an interstate equitable allocation is in no way present in a regime allowing private damage actions for infringement on riparian rights. Precedent, moreover, clearly distinguishes between vindication of riparian rights through injunctive relief and through compensatory damages. Damages may provide alternative relief when public policy requires denial of injunctive relief. *See, e.g., Harrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933); *New York City v. Pine*, 185 U.S. 93, 97 (1902). As shown below, the Second Circuit's failure to distinguish the two needlessly presents a serious constitutional problem and would disrupt the federal policy of encouraging interstate apportionment to resolve disputes among the states.

II.

THE SECOND CIRCUIT DECISION, IF ALLOWED TO STAND, MUST LEAD EITHER TO A DEPRIVATION OF PRIVATE RIPARIAN OWNERS' CONSTITUTIONAL RIGHT TO COMPENSATION OR TO A RESULT CONTRARY TO FEDERAL WATER RESOURCE MANAGEMENT POLICY.

Downstream riparian owners have a constitutional right[4] to compensation for an upstream governmental taking of riparian rights. *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177, 183 (1951); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936); *In re Van Etten v. City of New York*, 226 N.Y. 483, 124 N.E. 201 (1919); *Smith v. City of Rochester*, 92 N.Y. 463 (1883). *See New York City v. Pine*, 185 U.S. 93 (1902). The Second Circuit in *Badgley* has overlooked the constitutional issue of taking without compensation.

Although the State of Delaware does not read *Badgley* as dealing with the constitutional issue at all, arguably the Second Circuit may be addressing the question by its suggestion that

[4] U.S. CONST. amends. V. and XIV, §1.

downstream riparians seek recovery against their own sovereigns. 606 F.2d at 370. In any event, the Second Circuit's decision, by denying a right of recovery against the upstream diverter, would compel downstream riparians to seek recovery against their own sovereigns. This result cannot be allowed to stand.

The assumption that the private riparian may vindicate his rights by securing a remedy, including the recovery of damages, from his sovereign is unwarranted. A downstream state is neither a tort-feasor nor directly a property-taker under principles of eminent domain. The only basis upon which a private riparian might proceed against his state would be on a theory of inverse condemnation based on the state's participation in an interstate compact or proceedings in this Court leading to an equitable apportionment decree. In either case, absent its consent, the state's activity would be insulated from attack by the private riparian, on principles of sovereign immunity. *See Dugan v. Rank*, 372 U.S. 609 (1963); *Land v. Dollar*, 330 U.S. 731, 738 (1947).

Although the doctrine of sovereign immunity bars a cause of action against the downstream state, the State of Delaware, recognizing the constitutional deprivation that would otherwise ensue, may choose as a matter of policy to grant downstream riparians compensation. This possibility inhibits the state's participation in river basin management. If *Badgley* were read to establish a cause of action against the downstream state, an additional deterrent to continued interstate cooperation would be erected. The state would be acting at its peril in agreeing to any changes in existing interstate equitable apportionments or in agreeing to any change in the *status quo* of interstate water use. Any modification would affect riparian rights and give rise to a corresponding claim against the state. Such a burden on

interstate river cooperation is contrary to the federal policy to encourage interstate cooperation in management of river resources, a policy embodied in the Delaware River Basin Compact. *See, e.g.*, Water Resources Planning Act, §2, 42 U.S.C. §1962 (1976).

The Delaware River Basin Compact established the DRBC in order to manage more effectively the interstate water resources of the Basin. The signatories expressly preserved existing riparian rights along the Delaware. These provisions were added by the signatories, including the federal government, to "assuage the fears of those who may think that the compact will change private water rights."[5]

At the time the Compact was signed, federal law recognized that interstate apportionments of water restricted only the equitable remedies available to a riparian owner affected by the apportionment. It was not until *Badgley* that a federal court held that an interstate equitable apportionment also barred recovery for compensatory damages against the upstream taker. The State of Delaware has never considered that its actions affecting interstate allocations of water could be construed to deprive its riparian citizens of the right to recover against an out-of-state diverter. The state also never contemplated that these activities could create a cause of action against itself, as the *Badgley* case suggests. The holding of *Badgley* affects riparian rights in a manner never contemplated by the Compact and is in conflict with the policy of interstate cooperation.

If *Badgley* is permitted to stand, the likely result will be a diminished state interest in negotiating interstate water agreements. Interstate apportionments historically diminish the flow available to downstream states and their citizens. The *Badgley* case, unfortunately, also would effectively require participating states to concede their riparian citizens' right to be compensated

[5] Delaware River Basin Advisory Committee Meeting Staff Summary of Discussion, *cited in* Appendix H to the petition for writ of certiorari at 1h.

by the upstream diverter for the ensuing injury. This result localizes the burden of an equitable apportionment on the downstream state. The downstream state and its citizens would suffer a loss without compensation from the upstream diverter. The upstream diverter would gain his benefits without compensating the injured out-of-state interests. The paradoxical result of *Badgley* is that an unreasonable upstream diversion may be partially constrained through an apportionment of waters, but the downstream state loses its right to water, and its riparian citizens lose a right of compensation, unless they can proceed against their own state. If, as the Second Circuit suggests, they can proceed, then the sovereign would lose rights to water on behalf of its citizens and also would have to pay damages to its private riparian owners. Under either result, the downstream state loses any incentive to engage in interstate negotiation of water rights. Of immediate interest and concern are the negotiations which have been in progress for more than a year between the parties to the Decree.[6] These discussions are designed to reexamine the Decree in light of changed circumstances. These circumstances include the fact the main stream impoundment contemplated by the Decree has never been constructed and the recognition that the diversion and flow targets in the Decree cannot be met simultaneously during a severe drought.[7] The *Badgley* decision poses questions about the State of Delaware's continued participation in these negotiations.

Badgley establishes that a modification of the Decree, sanctioned by this Court, will result in the destruction of the rights of Delaware citizens to be compensated for upstream diversions or, in the alternative, in the exposure of the State of Delaware to suits for compensatory damages by its riparian citizens.

[6] *See* DRBC, ANNUAL REPORT 4 (1978).

[7] *See* DRBC, FINAL REPORT AND ENVIRONMENTAL IMPACT STATEMENT OF THE LEVEL B STUDY 57 (1979).

III.

THE SECOND CIRCUIT DECISION DIRECTLY AFFECTS THIS COURT'S EXERCISE OF ORIGINAL AND EXCLUSIVE JURISDICTION OVER CONTROVERSIES BETWEEN STATES.

The *Badgley* decision, although arising under the diversity jurisdiction, directly affects the Decree, a matter of continuing, exclusive and original jurisdiction.[8] The Second Circuit, in determining that the Decree extinguished the right of private riparians to recover compensatory damages from out-of-state, upstream diverters, has imputed a legal consequence to the Decree not previously recognized. Because of the *Badgley* decision's direct effect on the operation of the Decree, this Court should issue the writ to consider these questions which are entwined with its original and exclusive jurisdiction.

[8] CONST. art. III, §2; 28 U.S.C. §1251 (SUPP. II 1979).

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

RICHARD S. GEBELEIN
State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-3838
Attorney General of the State of Delaware

Of Counsel:

EUGENE R. FIDELL
AUSTIN P. OLNEY
ALAN KONEFSKY
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

May 16, 1980